

there was no fraudulent misrepresentation by the first and third defendants at the Land Scheme hearings as regards the boundary considering the evidence given before me in the light of the circumstances of this case.

Consequently since the parties and the subject matter are the same before this court as before the Land Scheme officers at first instance and at appellate level, if this had been an appeal under s 16 of the Ordinance, which it is not, it would have been in any case dismissed with costs.

Again, if this was an attempt to assert superior title under s 10 of the Ordinance for the disputed portion, it was as has been held earlier out of time as possessory title of the said disputed portion had been granted to the third defendant more than 18 months before the filing of the suit. It does not really matter that no one seems to know the exact area of the disputed portion, considering the evidence given, but this court is well assured that both the plaintiff and the defendants and in fact all the witnesses for both sides, including the two officers who conducted the Land Scheme hearings are actually aware where and what the disputed portion is.

I feel compelled to mention in passing the supplementary written submission of learned counsel for the plaintiff as regards the choice of words by the third defendant's husband (DW5) in his testimony and by the third defendant in her letter P12 that actually it was the defendants' land that had encroached into the plaintiff's land. I was aware of this when DW5 gave evidence and made the interpreter repeat the question but he chose to stick to his original answer. However, considering the totality of the evidence especially the fact that the plaintiff replied that he was not in a position to interfere, the very reason this action had been filed and the demeanour and social standing of the parties concerned, I was of the opinion that what DW3 and DW5 really meant was that it was the plaintiff's land that had encroached onto theirs. This failure to express themselves clearly as to which lot encroached onto which lot should not be taken to mean the opposite of what they meant otherwise why should the third defendant take the trouble to complain to the Land Scheme and maintain her complaint at three levels of hearing that it was the plaintiff's land that had encroached onto hers with the placing of the new boundary stones? For this reason, I found the supplementary submission completely devoid of merit.

Accordingly, I dismissed the plaintiff's claim with costs.

*Application dismissed.*

Solicitors: *C Jegathesan; P Dorairaj & Co.*

Reported by *PS Ranjan*

## A **PL Construction Sdn Bhd v Abdullah bin Said**

HIGH COURT (JOHORE BAHRU) – CIVIL SUIT NO 23-1339  
OF 1986  
ZAKARIA YATIM J  
17 MARCH 1988

B *Civil Procedure – Judgment in default of defence – Appeal against order setting aside judgment – Whether judgment irregular if no affidavit had been filed stating compliance with 48-hour notice under Legal Profession (Practice and Etiquette) Rules 1978 – Whether defence on the merits exists – Legal Profession (Practice and Etiquette) Rules 1978, r 56 – Rules of the High Court 1980, O 13 r 8*

C *Words and Phrases – ‘Defence on the merits’*

The defendant is a main contractor undertaking the construction of a school in Johore. The plaintiff agreed to undertake the construction of the school from the defendant and it was also agreed that the defendant would pay the plaintiff for the progressive work carried out by the plaintiff as and when the defendant was requested to pay by the plaintiff. Subsequently, the plaintiff demanded the payment of a certain sum but the defendant failed to pay. The plaintiff filed their writ and subsequently judgment in default of defence was given against the defendant. The defendant then filed an application to set aside the judgment on the ground that the plaintiff did not file an affidavit to say that the 48-hour notice under r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 had been complied with. The application was granted by the senior assistant registrar. The plaintiff appealed against this order of the registrar contending that there was no defence on the merits.

**Held**, dismissing the appeal but ordering that costs be borne by the defendant:

F (1) The 48-hour notice is only a practice rule as embodied in r 56 of the Etiquette Rules 1978. The plaintiff had complied with the rule and there is no need to file an affidavit to say that the rule had been complied with.

G (2) The term ‘defence on the merits’ means a defence which discloses an arguable and triable issue. From the draft statement of defence, there is a defence on the merits or at least there is an arguable case or an issue which should go for trial.

### Cases referred to

- 1 *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 (folld)
- 2 *Million Group Credit Sdn Bhd v Lee Shoo Khoo & Ors* [1986] 1 MLJ 315 (refd)
- 3 *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 (refd)
- H 4 *Fabrique Ebel Societe Anonyme v Syarikat Perniagaan Tukang Jam City Port & Ors* [1988] 1 MLJ 188 (refd)
- 5 *Evans v Bartlam* [1937] AC 473 (folld)
- 6 *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 (folld)
- 7 *B Dialdas & Co (Pte) Ltd v Sin Sin & Co & Ors* [1984] 2 MLJ 223 (folld)

### Legislation referred to

Legal Profession Act (Practice and Etiquette) Rules 1978 r 56  
Rules of the High Court 1980 O 13 r 8

*Tay Siew Fong* (Miss) for the plaintiff/appellant.  
*Gan Kim Sing* for the defendant/respondent.

*Cur Adv Vult*

**Zakaria Yatim J:** This is an appeal by the plaintiff against the decision of the senior assistant registrar given on 25 October 1987, ordering that judgment in default of defence entered against the defendant on 27 January 1987 be set aside.

The plaintiff is a registered company incorporated in Malaysia and has its place of business at No 27, Jalan Ungu 7, Taman Pelangi, Johor Bahru. The defendant is a main contractor undertaking the construction of Sekolah Agama, Air Molek, Johor Bahru from the SEDC, Johor. By an oral agreement made between the plaintiff and the defendant in July 1985, the plaintiff agreed to undertake the construction of the said school from the defendant. It was agreed that the defendant would pay the plaintiff for the progressive work carried out by the plaintiff as and when the defendant was requested to pay by the plaintiff. In the statement of claim the plaintiff averred that they commenced work on 3 September 1985, but in breach of the said oral contract the defendant refused, neglected and/or wrongfully refused to pay the sum of \$176,595.12 being progressive work done and material supplied on the site. The plaintiff had by a letter dated 13 August 1986 formally demanded for the said payment of \$176,595.12 but the defendant failed to pay the said sum or part of it. The contract between the parties was then mutually terminated.

The plaintiff filed their writ on 8 October 1986 and served it on the defendant on 26 November 1986. The defendant entered his appearance on 15 December 1986. No defence was filed after appearance was entered and on 19 February 1987 the plaintiff obtained judgment in default of defence against the defendant.

On 24 May 1987 the defendant filed an application to set aside the judgment in default of defence. The application was heard by the senior assistant registrar who granted the application with costs.

Before the plaintiff entered judgment in default of defence, the 48-hour notice under r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 was sent to the defendant by letter dated 9 January 1987. The defendant contended that the judgment in default of defence was an irregular judgment because the plaintiff did not file an affidavit to say that the 48-hour rule had been complied with. The senior assistant registrar accordingly set aside the judgment in default on this ground.

In my opinion the 48-hour notice is only a practice rule as embodied in r 56 of the Etiquette Rules 1978. In the present case the plaintiff had complied with the rule. There is no need to file an affidavit to say that the rule had been complied with. In fact even non-compliance with the rule does not render the judgment in default irregular. The judgment would only be an irregular judgment if the plaintiff failed to comply with any of the

A Rules of the High Court 1980. In *Asia Commercial Finance (M) Bhd v Bank Bumiputra Malaysia Bhd & Ors*,<sup>1</sup> I stated in my judgment at p 34:

B In my opinion, the Practice and Etiquette Rules 1978 only regulate the professional practice, etiquette, conduct and discipline of an advocate and solicitor. The Rules do not regulate the procedure of legal proceedings in the High Court... It is clear, therefore, that non-compliance with r 56 ... does not render the judgment in default of defence ... irregular. Under O 2 r 1 of the Rules of the High Court, only failure to comply with the Rules of the High Court shall be treated as an irregularity. In other words judgment in default of defence is only an irregular judgment if the plaintiff, in obtaining the judgment, failed to comply with the Rules of the High Court.

C In view of the passage quoted above, it is clear that the judgment in default of defence entered against the defendant in the present case is a regular judgment.

D Since it is a regular judgment the next question for the court to consider is whether there is an affidavit of merits.

E Curiously enough, there are two similar applications by the same defendant to set aside the same judgment in default. The first application was filed on 14 May 1987 and the application was supported by the affidavit of the defendant and the affidavit of the defendant's solicitor, Mohamad bin Ibrahim. The second application was filed on 24 May 1987 and that application was supported by the affidavit of the defendant's solicitor, Mohamad bin Ibrahim. From the record, it appears that the senior assistant registrar's decision was based on the second application. Since there are two applications and there are three affidavits in support of the two applications, it may be useful to examine whether all the three affidavits disclose any defence on the merits. The affidavit of Abdullah bin Said merely states that he had a good defence in this matter and he had a counterclaim against the plaintiff. It does not, however, give any particulars of his defence or his counterclaim. The affidavit of Mohamad bin Ibrahim does not mention any defence on the merits at all. In his affidavit in support of the second application, he states, however, that he 'verily believe that the defendant has a good defence in this matter and a counterclaim against the plaintiff'. The deponent does not give particulars of the defence and counterclaim in the affidavit. However, he exhibited a draft statement of defence and counterclaim to the same affidavit.

H Counsel for the plaintiff/appellant, Miss Tay Siew Fong, submitted that Encik Ibrahim's affidavit could not be used to support the application because a solicitor would not have personal knowledge of the facts of the case. According to her, the proper person to file the affidavit was the defendant himself. Accordingly, she said there was no evidence in support of the defence on the merits. In support of her submission she cited *Million*

*Group Credit Sdn Bhd v Lee Shoo Khoo & Ors*<sup>2</sup> and *Seng Huat Hang Sdn Bhd v Chee Seng & Co Sdn Bhd*.<sup>3</sup> I agree that solicitors should be discouraged from filing contentious affidavits or affidavits where there are disputed questions of fact. However, the Rules of the High Court 1980 do not, for example, prohibit a solicitor from filing an affidavit in support of an O 14 application provided that the requirements contained therein are complied with: see *Fabrique Ebel Societe Anonyme v Syarikat Perniagaan Tukang Jam City Port & Ors*.<sup>4</sup> Although the present case deals with the question of setting aside judgment in default of defence, in my opinion Encik Ibrahim's affidavit in support of the second application in so far as the draft defence and counterclaim exhibited to it is concerned, is relevant and admissible.

Under O 13 r 8, the court is given wide discretion to set aside or vary any judgment entered in default of appearance or in default of defence. In *Evans v Bartlam*,<sup>5</sup> Lord Atkin in his judgment at p 480 said '...that where the judgment was obtained regularly there must be an affidavit of merits, meaning that the applicant must produce to the court evidence that he has a prima facie defence...' In *Bank Bumiputra Malaysia Bhd v Majlis Amanah Ra'ayat*, Raja Azlan Shah Ag CJ (Malaya), as he then was, said, '...It is axiomatic that if the judgment is regular, then it is an inflexible rule that there must be an affidavit of merits, that is, an affidavit stating facts showing a defence on the merits...' The term 'defence on the merits' means a defence which discloses an arguable and triable issue: *B Daldas & Co (Pte) Ltd v Sin Sin & Co & Ors*.<sup>7</sup>

The question for the court to consider now is whether the draft statement of defence exhibited to Encik Ibrahim's affidavit discloses a defence on the merits or an arguable or triable issue.

In the second paragraph of the draft statement of defence, the defendant denies that he is required to pay the plaintiff as and when required but avers that the plaintiff is entitled to claim a sum equivalent to the value of the works done by the plaintiff less 6% as agreed between the parties, and this is to be ascertained by the SEDC Johor. In para 4, the defendant avers that the plaintiff intimated to him sometime in April 1986 that the plaintiff wished to terminate the contract as the plaintiff was not in a position to carry on with the work. In para 5 the defendant avers that the employer (Perbadanan Kemajuan Ekonomi Negeri Johore) paid the defendant on 5 June 1986 a sum of \$151,300. In paras 6-7, the defendant states that he had made payments to third parties and after having made such payments, the plaintiff is entitled to a payment of \$54,476.55. The defendant, however, avers that he is entitled to set-off the said sum for losses suffered by him as a result of delay caused by the plaintiff. In his counterclaim, the defendant

A alleges that the plaintiff failed and/or neglected to execute the works in accordance with the time schedule stipulated by the employer in the tender agreement which the defendant intends to refer to at the trial. The defendant further states that the plaintiff through their neglect and/or refusal caused a delay of 90 days whereby the defendant was penalized by the employer for a sum of \$300 a day causing a total loss of \$27,000. In view of the delay the defendant claims from the plaintiff a sum of \$500 a day being loss suffered by the defendant and the total amount claimed is \$45,000. The defendant accordingly claims from the plaintiff a sum of \$72,000 in the counterclaim.

C In my opinion, from the draft statement of defence, there is a defence on the merits or at least there is an arguable case or an issue which should go for trial.

D For the reasons stated above, I dismiss the plaintiff's appeal. The defendant will file his defence within three weeks from the date of this judgment. The defendant will pay the costs of this appeal and the costs of the application before the registrar to the plaintiff.

Order accordingly.

E Solicitors: *Sault & Co; Gan & Lim*.

Reported by Ng Sheau Jiuan

## F **Chan Kin & Anor v Chareen Realty Development Sdn Bhd**

HIGH COURT (IPOH) – ORIGINATING MOTION  
NO 32-55-1986  
G ABDUL MALEK J  
28 APRIL 1988

*Civil Procedure – Application for leave to sign judgment – Rules of the High Court 1980, O 81*

H *Contract – Agreement in writing to develop land – Condition requiring party to obtain approval for conversion of category of land use and subdivision within specified period – Approvals not obtained within specified period – Party alleging oral agreement to extend time – Whether breach of contract had occurred – Termination*

I *Evidence – Agreement in writing – Oral agreement varying terms of written agreement alleged – Whether evidence of oral agreement may be included – Evidence Act 1950, s 92*

By an agreement in writing dated 6 April 1983 between the applicants and the respondent, the applicants had allowed the respondent, on payment of the sum of \$20,000 to them, to develop a piece of land owned by the applicants. By cl (1)(b) of art 2 of the agreement it was agreed that if the respondent failed to obtain the necessary approvals for conversion of the category